



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

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SECRETARY

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Secretary's Order No.: 2021-CCE-0030

RE: Approving Final Amendments to 7 DE Admin. Code 2103: *Regulations for the Green Energy Program* ("GEF Regulations")

Date of Issuance: December 13, 2021

Effective Date of the Amendment: January 11, 2022

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), and pursuant to 29 *Del.C.* §8057, *Green Energy Fund*, and all other relevant statutory authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced promulgation.

Background, Procedural History and Findings of Fact

This Order relates to the Department's proposed regulatory amendments to 7 DE Admin. Code 2103: *Regulations for the Green Energy Program* ("Amendments"). The Green Energy Fund ("GEF") was established by 29 *Del.C.* §8057 in 1999. The Department initially promulgated the *Regulations for the Green Energy Program* ("GEF Regulations") to govern the GEF in 2004, and then adopted revisions to those regulations in 2006.

At present, the GEF Regulations are outdated, and require revisions to (1) regulate the *Green Energy Endowment Program*, the *Technology Demonstration Program*, and the *Research and Development Program*; (2) correct existing regulatory language regarding grant funding matters; (3) enable the Department to establish a low- and moderate-income solar grant program, subject to the availability of funds; and (4) strike overly detailed and prescriptive regulatory language as presently contained therein.

The promulgation of the proposed Amendments will enable the Department, through the Division of Climate, Coastal and Energy (“CCE”), to manage the GEF more efficiently, and will provide the Department greater flexibility to efficiently operate grant programs. Specifically, the proposed substantive changes to the existing regulations are as follows:

- Section 4.0: *Green Energy Fund* – Adds existing statutory language to allow unexpended funds during a particular year to be allocated for expenditure in subsequent years.
- Section 5.0: *Green Energy Program* – Adds existing statutory language to clarify allowable expenditures under the Green Energy Program. Removes references to outdated grant incentive maximums. Adds regulatory language to allow for the removal of contractors from the Green Energy Program’s Participating Contractors List. Removes Energy Efficiency Information Programs that have not been utilized since the creation of the Green Energy Program.
- Section 6.0: *Technology Demonstration Program* – Adds existing statutory language to clarify allowable expenditures under the Technology Demonstration Program. Also adds regulatory language that allows proposals to be received on a rolling basis.
- Section 7.0: *Research and Development Program* – Adds existing statutory language to clarify allowable expenditures under the Research and Development Program. Also adds regulatory language that allows proposals to be received on a rolling basis.

- Section 10.0: *Solar Energy Curriculum Program* – Adds the Solar Energy Curriculum Program that exists in the statutory language to the regulatory language.
- Section 11.0: *Other Eligible Programs* – Adds regulatory language to allow the GEF to develop new programs that are consistent with the goals of the Fund, subject to the availability of funds, as provided for under 29 *Del.C.* §8057(d).

The Department has the statutory basis and legal authority to promulgate these proposed Amendments, pursuant to 29 *Del.C.* §8057, *Green Energy Fund*. It should be noted that the CCE considered input and received technical advice from the offices of both the Delaware Public Advocate and the Public Service Commission during the development of the proposed Amendments.

The Department published the initial proposed Amendments in the July 1, 2021, *Delaware Register of Regulations*. Subsequent to the initial publication, but prior to the public hearing, the Department made several non-substantive clerical corrections to the initial proposed Amendments. Those corrections were fully vetted and discussed by Department staff at the public hearing held on July 28, 2021 and were further documented in the hearing record (“Record”) as Department Exhibit 7, *Summary of Edits*.

Two members of the public attended the public hearing held in this matter, and those comments will be discussed further below. Following the close of the public comment period on August 12, 2021, the CCE performed a review of the Record and prepared a Technical Response Memorandum (“TRM”), dated September 3, 2021. The contents of the TRM will be discussed in further detail below. It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

As indicated above, comments were received by the Department at the time of the public hearing from Jeremy M. Firestone, Ph.D., and Steven Hegedus, Ph.D. It should be noted that, while both commenters are associated professionally with the University of Delaware, the comments provided for inclusion into the Record were offered as those of private citizens, and not on behalf of any organization. Following the date of the public hearing, the Record remained open for receipt of public comment (through August 12, 2021), however, no comments other than those offered by both Dr. Firestone and Dr. Hegedus at the time of the hearing were received in this matter.

At the hearing, Dr. Firestone offered criticism of existing language contained in the GEF Regulations, specifically, of the requirement "...to show that this 'project' is an improvement over existing products that provide a similar function." He also voiced concern regarding the cost share requirements of the GEF, specifically, that such requirements are problematic in the Social Sciences because "...we don't have industry partners. And.... don't generally want industry partners because we want our work to appear non-biased." In his comments, Dr. Hegedus advised that he believed the GEF is a "...wonderful opportunity to sponsor some exploratory and innovative research here within the State that meets the State's particular needs." He too, however, voiced concerns regarding the cost share requirements set forth in the regulations, specifically, the 65% cost share that university researchers at nonprofit organizations must contribute for a research project. Dr. Hegedus suggested that the Department insert additional regulatory language that would allow a smaller cost share requirement (such as 25%) for a nonprofit research organization located within the State of Delaware.

After the close of the Record, the Department's CCE prepared the TRM, at the request of Hearing Officer Lisa A. Vest. This TRM, dated September 3, 2021, not only provided responses to the comments received at the time of the hearing, but also recommended additional, non-substantive revisions be made to the proposed Amendments. The additional revisions were made by CCE during the post-hearing phase of this promulgation to offer further clarity to the regulatory language governing the GEF, and to provide a greater understanding to the regulatory community regarding this matter.

As a response to the comments received at the time of the hearing, the CCE's TRM indicates that the regulatory language found in subsection 7.4, *Acceptable Projects*, is mirrored after the statutory language found in 29 *Del.C.* §8057(d)(3)(a)(2), which states that the *Research and Development Program* will "...provide grants equal to no greater than 35% of the cost of project for the development of a product in Delaware directly related to Renewable Energy Technology...". Thus, the Department cannot alter the definition of "acceptable projects," as set forth in the GEF Regulations. The CCE's TRM further notes that the statutory language found in 29 *Del.C.* §8057 creates a mechanism for providing funding for Technology Demonstration and Research and Development work in Delaware, and the Department recognizes the value of supporting such work. The cost share requirements outlined in Section 6.0 for the *Technology Demonstration Program* and Section 7.0 for the *Research and Development Program* are set by 29 *Del. C.* §8057(d)(2) and (d)(3), respectively. As such, the Department cannot change the cost share percentages set forth in this regulation and must follow the statute. The Department may, however, seek to use other funding mechanisms to support such work as appropriate.

In addition to providing formal responses to the comments received at the time of the hearing, the TRM also recommended additional revisions that the CCE determined to be necessary as a result of the Department's review of the Record during the post-hearing phase of this regulatory promulgation. The additional proposed revisions as set forth in the TRM are non-substantive in nature and are being recommended by the CCE to provide further clarity and understanding to the regulated community regarding the GEF Regulations.

Following her review of the TRM, Hearing Officer Vest prepared her Hearing Officer's Report, dated December 10, 2021 ("Report"), which expressly incorporated into the Record the Department's *revised* proposed Amendments and the CCE's TRM, dated September 3, 2021, attached to her Report as Appendices "A" and "B," respectively. The Report documents the proper completion of the required regulatory development process, establishes the Record, and recommends the adoption of the Department's *revised* proposed Amendments, as attached to the Report as Appendix "A."

Reasons and Conclusions

The Department currently proposes the adoption of the *revised* proposed amendments to 7 DE Admin. Code 2103, *Regulations for the Green Energy Program*. As noted above,, the GEF Regulations are outdated, and require revisions to (1) regulate the *Green Energy Endowment Program*, the *Technology Demonstration Program*, and the *Research and Development Program*; (2) correct existing regulatory language regarding grant funding matters; (3) enable the Department to establish a low- and moderate-income solar grant program, subject to the availability of funds; and (4) strike overly detailed and prescriptive regulatory language as presently contained therein. Furthermore, as noted above, the CCE has also recommended additional, non-substantive revisions, developed as a result of the Department's review of the Record during the post-hearing phase of this promulgation. I concur with the recommended, non-substantive revisions to the Amendments, as they provide further clarification of the regulatory language and a greater understanding of the GEF Regulations for the benefit of the regulated community.

Based on the Record developed by the Department's experts and established by the Hearing Officer's Report, I find that the Department has provided appropriate reasoning regarding the need for the *revised* proposed Amendments, and that the same is well-supported. I further find that the Department's experts fully developed the Record to support adoption of the *revised* proposed Amendments to the GEF Regulations, as the same will enable the Department, through the CCE, to manage the GEF more efficiently, and will provide the Department greater flexibility to efficiently operate grant programs.

Thus, for the reasons stated above, the recommendations of the Hearing Officer are hereby adopted, and I direct that the *revised* proposed Amendments to 7 DE Admin. Code 2103, *Regulations for the Green Energy Program*, be promulgated as final.

In conclusion, the following reasons and conclusions are hereby entered:


1. The Department has the statutory basis and legal authority to act with regard to the *revised* proposed amendments to 7 DE Admin. Code 2103, *Regulations for the Green Energy Program*, pursuant to 29 *Del.C.* §8057, which authorizes the Department to adopt rules governing the State of Delaware's *Green Energy Fund*;
2. The Department has jurisdiction under its statutory authority to issue an Order adopting the *revised* proposed Amendments as final;
3. The Department provided adequate public notice of the proposed Amendments and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same subsequent to the time of the public hearing (through August 12, 2021), in order to consider all public comment on the same before making any final decision;
4. Promulgation of the *revised* proposed Amendments, as set forth in the CCE's TRM expressly incorporated herein, will enable the Department, through the CCE, to manage the GEF more efficiently. The *revised* proposed Amendments will provide the Department greater flexibility to efficiently operate its grant programs, establish a low- and moderate-income solar grant program, subject to the availability of funds, update current regulatory language, and provide greater clarity and understanding to the regulated community;
5. The Department has reviewed the *revised* proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible, and desirable, that it will not establish reporting requirements or substantive additional costs for individuals or small businesses, and that the recommendations as proposed should be applicable to all Delaware individuals or small businesses equally;

6. The Department's proposed Amendments, as initially published in the July 1, 2021, *Delaware Register of Regulations*, and then subsequently *revised* as set forth in Appendix "A" of the Hearing Officer's Report, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, the same should be approved as final Amendments, which shall go into effect ten days after publication in the next available issue of the *Delaware Register of Regulations*;

7. The Hearing Officer's Report, including its established Record and the recommended *revised* proposed Amendments, as set forth therein in Appendix "A," are hereby adopted to provide additional reasons and findings for this Order;

8. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

9. The Department shall submit this Order approving as final the *revised* proposed Amendments to the *Delaware Register of Regulations* for publication in its next available issue and provide such other notice as the law and regulation require, as the Department determines is appropriate.


Shawn M. Garvin
Secretary